Supreme Court, U.S.
FILED
NOV 14 1989
JOSEPH F. SPANIOL, JR.
CLERK

89-763
NO.

In the Supreme Court of the United States

OCTOBER TERM, 1989

MICHAEL S. FERDINAND, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

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NOVEMBER 1989

QUESTION PRESENTED

Whether the petitioner was denied due process of law as required by the Fifth Amendment to the United States Constitution when the Court of Military Appeals held the improperly admitted hearsay evidence of appellant's daughter was harmless error.

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In the Supreme Court of the United States

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No.

MICHAEL S. FERDINAND, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

The petitioner, Michael S. Ferdinand, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Military Appeals entered in his case on September 27, 1989.

OPINIONS BELOW

The opinion of the United States Court of Military Appeals is reported at 29 M.J. 164 (C.M.A. 1989) (Appendix A). An unreported decision of the Air Force Court of Military Review was rendered April 21, 1988 (Appendix B).

JURISDICTION

The jurisdiction of this Court is invoked under 10 U.S.C. § 867(h) (Supp. III 1985) and 28 U.S.C. § 1259(3) (Supp. III 1985). The judgment of the Court of Military Appeals was entered on September 27, 1989.

CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment provides:

> No person shall be . . . deprived of life, liberty or property, without due process of law . . .

The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with witnesses against him . . .

Article 59(a) of the Uniform Code of Military Justice, 10 U.S.C. § 834 (1982) provides:

> (a) A finding or sentence of a court-martial may not be held incorrect on the ground of any error of law unless the error materially prejudices the substantial rights of the accused.

STATEMENT OF THE CASE

On August 20-21, 1987, petitioner was convicted by a general court-martial at Offutt AFB, Nebraska, on charges of indecent acts with his seven year old daughter, over a two-year period, in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934. He was sentenced to be confined for four years, reduced to pay grade E-1, and dishonorably discharged.

Of his own volition, petitioner turned himself in to the Sarpy County Sheriff's Department, admitting his sexual misconduct with his daughter. He described incidents where he would masturbate himself while his daughter masturbated herself. He further admitted that on occasions his daughter would touch his penis. No intercourse ever occurred. Following his admissions, the daughter was placed under the protection of the Sarpy County Juvenile Count and a guardian *ad litem* was appointed.

At trial, prosecution introduced into evidence a taped interview of the daughter by Deputy Sheriff Gabriel under Mil.R.Evid. 804(b)(5), (hearsay exception, declarant unavailable). To support the admissibility of the prosecution exhibit, trial counsel called Mrs. Joann Ferdinand to the stand. Mrs. Ferdinand was subpoenaed to appear at her husband's trial, and to bring their daughter to the court-martial. Additionally, the daughter was subpoenaed. Mrs. Ferdinand refused to bring the daughter to the court-martial as she had a separate court order from the Juvenile Court of Sarpy County which restrained her daughter "from testifying at any hearing or court proceeding outside the separate Juvenile Court of Sarpy County, Nebraska, concerning the incidents involved in the proceeding." Mrs. Ferdinand refused to bring her daughter to the court, despite the trial judge's order to do so. Ultimately, the judge found the daughter unavailable under Mil.R.Evid. 804, and admitted the taped interview as evidence against petitioner, as corroboration of this confession.[1]

The Air Force Court of Military Review affirmed the findings of guilt and approved sentence. The court found that "no error prejudicial to the substantial rights of the accused was committed." *United States v. Ferdinand*, ACM 26373, slip op. (A.F.C.M.R. April 21, 1988).

The United States Court of Military Appeals found the trial judge erred in finding the daughter unavailable within the meaning of Mil.R.Evid. 804(b)(5) and further found the admission of the interview at trial violated petitioner's right to confrontation under the Sixth Amendment. *United*

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[1] The United States Court of Military Appeals disagreed with the trial judge's findings that any further efforts to secure the daughter's presence at trial would be futile, as he never exercised his contempt powers under Article 48, U.C.M.J., 10 U.S.C. § 848, and relied only on her threats to disobey his order before an order was ever issued.

States v. Ferdinand, 29 M.J. 164 (C.M.A. 1989). Nevertheless, the court concluded that they were "convinced that the admission of [the daughter's] statements was harmless error beyond a reasonable doubt." *Id.* at 168. In reaching this conclusion, the court relied on the testimony of an Air Force Nurse, Captain Kane, who testified that she had conducted a vaginal examination of the daughter. Captain Kane explained that there was no evidence of sexual penetration; however, there was no hymen present, which she testified was "consistent" with repeated masturbation. She further testified that in the pre-school-age child, masturbation is not unusual.

At the conclusion of the government's case, the trial defense counsel moved for a finding of not guilty, on the basis that the daughter's hearsay testimony did not sufficiently corroborate the confession of the petitioner. The judge agreed as to one of the specifications, and, accordingly found petitioner not guilty of that particular offense.[2]

REASONS FOR GRANTING THE WRIT

Every criminal defendant has the right to a fair trial in accordance with the principles of due process guaranteed by the Federal Constitution. This is not to say that a defendant is guaranteed an error-free trial. *United States v. Hasting*, 461 U.S. 499, 508-09 (1983); *See also Delaware v. Van Arsdell*, 475 U.S. 673 (1986); *Brown v. United States*,

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[2] The military judge found petitioner not guilty of specification 5 of the Charge. This specification alleged that petitioner committed an indecent act with his daughter by having her sit on his lap while she masturbated herself and rubbed his penis with her legs, with intent to gratify the sexual desires of petitioner. This specification is distinguishable from the other offenses of which he was convicted, only as to the time frame during which it allegedly occurred.

411 U.S. 223, 231-32 (1973). Recognizing this precept, federal and military harmless error statutes have been enacted. 10 U.S.C. § 859(a) (1982); 28 U.S.C. § 211 (1982); Article 59(a), U.C.M.J.; *see also* Fed.R.Crim.P. 52(a). Essentially, these statutes preclude reversal of convictions by a reviewing court when the "errors or defects have little, if any, likelihood of having changed the results of trial." *Chapman v. California*, 386 U.S. 18, 22 (1967); *see, Rose v. Clark*, 478 U.S. 570 (1986). On the other hand, these harmless error rules emphasize an intention not to treat as harmless those constitutional errors that "affect substantial rights of a party." *Chapman v. California, supra,* at 23.

When the error is of constitutional dimension, as in the present case, the standard of review of harmless error is necessarily strict. In *Chapman, supra*, this Court rejected the argument that all constitutional errors, regardless of the facts and circumstances, must automatically be deemed harmful. Nevertheless, the Court stated that when federal constitutional error is committed, reversal is required unless the reviewing court can "declare a belief that [the error] was harmless beyond a reasonable doubt." *Id.* at 24. This beyond a reasonable doubt test requires the reviewing court to find there was no possibility that the error affected the decision of the trial court. *See United States v. Kotteakos*, 328 U.S. 750 (1976); *Schneble v. Florida*, 405 U.S. 427 (1972); *Milton v. Wainwright*, 407 U.S. 371 (1972). If there is a possibility that the evidence complained of might have contributed to the conviction, then the error of its admission cannot be deemed harmless. *Chapman v. California, supra* at 827-28; *Fahy v. State of Connecticut*, 375 U.S. 85 (1963).

It is widely accepted that a conviction cannot be based solely on an uncorroborated, out of court admission or

confession of the accused. *See generally*, McCormick on Evidence § 145 (E. Cleary 3d Ed. 1984). As explained in *Smith v. United States*, 348 U.S. 147 (1954) the purpose of this rationale is to prevent "errors in convictions based upon untrue confessions alone." 348 U.S. at 153. *Warszower v. United States*, 312 U.S. 342, 347 (1941). The corroborative evidence need not be sufficient, independent of the statements, to establish the *corpus delicti*. Nevertheless, the government must introduce "substantial independent evidence which would tend to establish the trustworthiness of the statement." Thus, the corroborative evidence must support the essential facts admitted sufficiently to justify a jury inference of their truth. *Opper v. United States*, 348 U.S. 84, 93 (1954). *See also, United States v. Melvin*, 26 M.J. 145 (C.M.A. 1988).

Military Rules of Evidence 304(g) tracks the present law concerning corroboration. The rule states that a confession may be considered as evidence against the accused on the question of guilt or innocence only if independent evidence, direct or circumstantial, has been introduced that corroborates the essential facts admitted to justify sufficiently an inference of their truth. It further states that if independent evidence raises an inference of truth of some but not all the essential facts admitted, then the confession may be considered as evidence against the accused only with respect to those essential facts stated in the confession that are corroborated by the independent evidence. Applying *Opper* in *Wong Sun v. United States*, 371 U.S. 471, 489-90, N. 15 (1963) this Court explained that where the crime involved physical damage or injury, the government must prove the injury for which the accused confesses. But where the crime involves no tangible *corpus deliciti* the corrobative evidence must implicate the accused

in order to show that a crime has been committed. *Smith v. United States, supra,* at 154.

Applying, then, the relevant test for harmless error, it is clear in this case that the erroneous admission of the daughter's hearsay testimony did in fact affect the decision of the trial court, and contributed to the conviction. Mil.R.Evid. 304(g)(2) provides that it is the sole responsibility of the military judge to "determine when adequate evidence of corroboration has been received." *See also, United States v. Yates*, 24 M.J. 114 (C.M.A. 1987). Thus, at trial it is for the military judge to determine whether the corroborating evidence is sufficient to "raise an inference of the truth of the essential facts admitted." Mil.R.Evid. 304(g)(1).

Here, the military judge, considering all the government's evidence, including both the nurse's testimony and the daughter's hearsay statements, found the petitioner not guilty of one specification of indecent acts, not unlike the remaining offenses, wherein the petitioner allegedly allowed his daughter to masturbate herself while sitting in the petitioner's lap. The clear impact of this ruling is that the trial judge, in determining adequate evidence of corroboration under Mil.R.Evid. 304(g)(2), did not consider the testimony of Captain Kane adequate, standing alone, to corroborate petitioner's confession. This finding by the trial judge would be consistent with *Wong Sun* and *Smith*, requiring the corroborating evidence to implicate the accused, as there was no tangible *corpus delicti.*[3] Because the

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[3] Captain Kane's testimony that the daughter had no hymen cannot be equated to physical evidence or the *corpus delicti* of sexual abuse. She testified only that such was "consistent with" masturbation. Furthermore, she explained that such masturbation is not unusual in preschool age girls. Therefore, one can see where the trial judge could

military judge apparently relied completely on the constitutionally forbidden testimony of petitioner's daughter to corroborate petitioner's admissions, it is only reasonable to assume that, absent that testimony, he would have similarly entered not guilty verdicts on the remaining charges.

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find that such evidence did not sufficiently implicate the petitioner or adequately corroborate the confession.

CONCLUSION

Absent the constitutionally forbidden testimony of petitioner's daughter, the military judge might very well have brought in not guilty verdicts on the remaining charges of which petitioner stands convicted. Under these circumstances, it is completely impossible to say that the government demonstrated, beyond a reasonable doubt, that the admission of the daughter's hearsay testimony did not contribute to petitioner's conviction. Accordingly, the petitioner contends the Court of Military Appeal's conclusion of harmless error was erroneous, and the case warrants further examination by this Court. Therefore, the Petition for Writ of Certiorari should be granted.

Respectively submitted,

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NOVEMBER 1989

APPENDICES

APPENDIX A

UNITED STATES COURT OF MILITARY APPEALS

No. 60,322
ACM 26373

UNITED STATES, APPELLEE

v.

MICHAEL S. FERDINAND, STAFF SERGEANT
U.S. AIR FORCE, APPELLANT

September 27, 1989

Counsel

For Appellant: *Major Lynne H. Wetzell* (argued); *Colonel Richard F. O'Hair* (on brief); *Colonel Leo L. Sergi.*

For Appellee: Major Carole W. Hanson (argued); *Colonel Joe R. Lamport, Lieutenant Colonel Robert E. Giovagnoni, Major Kathryn I. Taylor* (on brief).

OPINION OF THE COURT

COX, Judge:

Appellant was tried by general court-martial convened at Offutt Air Force Base, Nebraska, before a military judge alone. Contrary to his pleas, appellant was found guilty of four specifications of committing indecent acts against his own 7-year-old daughter, C, over a 2-year period, in violation of Article 134, Uniform Code of Mili-

tary Justice, 10 USC § 934. He was sentenced to be confined for 4 years, reduced to pay grade E-1, and dishonorably discharged. The convening authority approved the sentence as adjudged, and the Court of Military Review affirmed the findings and sentence in an unpublished memorandum opinion dated April 21, 1988.

This Court granted review on the following issue:

> WHETHER THE MILITARY JUDGE ERRED TO THE SUBSTANTIAL PREJUDICE OF APPELLANT WHEN HE RELIED ON THE ORDER OF A STATE JUVENILE COURT DIRECTING THAT THE VICTIM IN THIS CASE NOT TESTIFY IN ANY OTHER COURT CONCERNING THESE OFFENSES.

The Government's case rested upon appellant's confession, which was given to Deputy Sheriff Robin Gabriel of Sarpy County, Nebraska, on March 30, 1987. This confession was corroborated by an earlier admission appellant had made to his wife and by a transcript of a videotaped interview between C and Deputy Sheriff Gabriel, which took place on the day after the confession was obtained.

The Government offered the transcript of the interview as an exception to the rule against hearsay, in that C was unavailable to testify at trial and the interview had requisite "circumstantial guarantees of trustworthiness" under Mil.R.Evid. 804(b)(5), Manual for Courts-Martial, United States, 1984. Defense counsel objected to admitting the transcript, arguing that the Government had not shown C was unavailable to testify as a witness and that the statement was not reliable.

The Government's proffer that C was unavailable was based upon the following: Prior to referral of charges to court-martial, appellant's daughter was assigned a guardian *ad litem* by the Separate Juvenile Court For Sarpy

County, Nebraska. In addition, the Juvenile Court issued an order on August 13, 1987, prohibiting appellant's daughter "from testifying at any hearing or court proceeding outside the Separate Juvenile Court of Sarpy County, Nebraska, concerning the incidents involved in this [Juvenile Court] proceeding." Shortly thereafter, appellant's wife took C and moved from their residence in Sarpy County, Nebraska, to Blaine, Minnesota. Mrs. Ferdinand was personally served in Minnesota with a subpoena for herself and a subpoena *duces tecum*, ordering her to appear at appellant's trial and to bring her daughter to testify. Mrs. Ferdinant appeared at trial but refused to bring her daughter.

Mrs. Ferdinand testified that her primary reason for not bringing her daughter was that C was undergoing therapy as a result of the sexual abuse and forcing her to testify would cause "a setback in her therapy." Mrs. Ferdinand based this upon her own observations of C, as well as the advice of a therapist. Mrs. Ferdinand relied upon the advice of the therapist that "there is no reason to put a child through that." Mrs. Ferdinand also testified that she had been told by the state-appointed guardian *ad litem* that if she were to bring C to testify, in violation of the Juvenile Court order, then the state would take custody of her daughter.

Mrs. Ferdinand indicated that she had consulted with an attorney prior to her decision to disobey the subpoena *duces tecum*. In addition, a stipulation of testimony from the guardian *ad litem*, who was also an attorney, indicated that she also "would refuse to produce" C to testify, "knowing full well the possible consequences of such refusal."

When questioned by the military judge as to her reasons for not bringing her daughter, the following colloquy took place:

Q. Do you understand you've been lawfully subpoenaed by the Federal Government to bring . . . [C] with you to testify?
A. Yes, sir.

* * *

Q. And you understand that I can order you to do that and to comply with the subpoena, and if you do not, I can put you in jail, do you understand that?
A. Yes, Sir.
Q. Very well. I order you to bring her here to testify in this hearing. Do you agree to do that?
A. No, Sir.
Q. Why not?
A. Because I, as her mother, couldn't bring her in clear conscience. It's not right to have her testify against her father.

Based upon Mrs. Ferdinand's testimony, the military judge found that any attempt to force her to produce C to testify would be "a futile gesture" and ruled that C was unavailable. He also found the interview to have "circumstantial guarantees of trustworthiness," Mil.R.Evid 804(b)(5), noting C's young age, her lack of animosity toward her father, and the fact that appellant's own confession corroborated C's statements. He therefore admitted the document.

We are not convicted that C was unavailable within the meaning of Mil.R.Evid. 804(b)(5). Admission of the interview at trial violated appellant's right to confrontation under the Sixth Amendment.

Child-sexual-abuse cases have compelled a dilemma of pitting an accused's Sixth Amendment right to confront and cross-examine witnesses against codified exceptions to hearsay.[1] The dilemma has been no less affected by society's interest in protecting a child from the trauma of testifying against an abusive parents or adult.[2]

The confrontation clause of the Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." By the same token, the "Rule Against Hearsay," *McCormick on Evidence* §§ 244-53 (E. Cleary 3d ed. 1984), prohibits introduction of "a statement, other than the one made by the declarant while testifying at the trial," which is "offered in evidence to prove the truth of the matter asserted." Mil.R.Evid. 801(c) and 802. Thus, the rule against hearsay and the Confrontation Clause both reflect "the core of the values furthered by" the "right to confront' the witness at the time of trial." *California v. Green*, 399 U.S. 149, 157, 90 S.Ct. 1930, 1934, 26 L.Ed.2d 489 (1970). Both "reflect[] a preference for face-to-face confrontation at trial." *Ohio v. Roberts*, 448 U.S. 56, 63, 100 S.Ct. 2531, 2537, 65 L.Ed.2d 597 (1980) (footnote omitted).

The Supreme Court has held, however, that the Confrontation Clause is not "a codification of the" rule against hearsay. *California v. Green, supra* at 155, 90 S.Ct. at 1933-34. Further, although the "rule against hearsay . . .

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[1] *See* Graham, *The Confrontation Clause, the Hearsay Rule, and Child Sexual Abuse Prosecutions: The State of the Relationship*, 72 Minn.L.Rev. 523 (1988); Note, *The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations*, 98 Harv.L.Rev. 806 (1985).

[2] *Cf. Coy v. Iowa*, ___ U.S. ___, 108 S.Ct. 2798, 2803-04 (1988) (O'Connor, J., concurring).

is riddled with exception," *Ohio v. Roberts, supra* at 62, the Court has upheld a number of these exceptions as not being violative of the Confrontation Clause, even though a declarant did not testify at trial. *Id; United States v. Inadi*, 475 U.S. 387, 106 S.Ct. 1121, 89 L.Ed.2d 390 (1986); *Dutton v. Evans*, 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970).

Residual hearsay is permissible under Mil.R.Evid. 804(b)(5), provided the Government adequately demonstrates the declarant's "unavailab[ility] as a witness." *See* Mil.R.Evid. 804(a). In determining unavailability, "[t]he ultimate question is whether the witness is unavailable despite good-faith efforts undertaken prior to trial to locate and present that witness." *Ohio v. Roberts, supra* at 74, 100 S.Ct. at 2531; *Barber v. Page*, 390 U.S. 719, 88 S.Ct. 1318, 20 L.Ed.2d 489 (1968). Nonetheless, "*if there is possibility, albeit remove, that affirmative measures might produce the declarant, the obligation of good faith may demand their effectuation.* The lengths to which the prosecution must go to produce a witness . . . is a question of reasonableness.' *California v. Green*, 399 U.S. at 189, n.22 . . .," *United States v. Burns*, 27 MJ 92, 96 (CMA 1988), quoting *Ohio v. Roberts, supra* at 74 (emphasis added). Moreover, a military judge is not merely a passive observer in determining a witness' unavailability. *Cf. United States v. Rousseau*, 25 MJ 188 (CMA 1987) (Everett, C.J., concurring in the result); *United States v. Hinton*, 21 MJ 267 (CMA 1986).

Obviously, there was no problem of locating either Mrs. Ferdinand or C. *Cf. United States v. Wind*, 28 MJ 381 (CMA 1989); *United States v. Hubbard*, 28 MJ 27 (CMA 1989). The Government had issued the subpoena *duces tecum* to Mrs. Ferdinand personally at her residence in Blaine, Minnesota, after she had moved with her daughter from Nebraska. It would appear that the Government had

exercised reasonable, affirmative measures to secure C's presence as a witness. Affirmative measures to protect an accused's Sixth Amendment right to confront and cross-examine witnesses, however, do not end simply with service of a subpoena.

Although we are not satisfied with the subsequent efforts by the Government and the military judge to secure the child's presence at trial, we do not agree with appellate defense counsel's argument that the military judge relied soley on the Sarpy County Juvenile Court Order in determining that C was unavailable. The record evinces that Mrs. Ferdinand's paramount fear was the psychological and emotional impact that testifying at trial would have upon her daughter. She maintained her intransigence in the courtroom, reinformed by her attorney, that she "couldn't bring . . . [C] in clear conscience . . . to have her testify against her father."

Any reliance Mrs. Ferdinand placed upon the court order is substantially outweighed by her concern for her daughter's emotional welfare. The record does not demonstrate that she thought or had been advised by counsel that the order from juvenile court superseded the Federal subpoena. The record also does not indicate that the military judge found this to be the law.

The military judge's assessment, however, that any further efforts to secure C's presence at trial would be "futile" was inaccurate. A military judge is hardly exercising his contempt powers under Article 48, UCMJ, 10 U.S.C. § 848, when he finds that any efforts to compel a mother to produce a child to testify would be "futile" simply because she threatens to disobey his order before it is even issued. *Cf. United States v. Rousseau, supra.*[3]

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[3] "Process issued in court-martial cases to compel witnesses to appear and testify . . . shall be similar to that which courts of the United

We are mindful, as are several state jurisdictions, that a child may be found to be unavailable to testify if a psychiatrist or psychologist has demonstrated that participation in a trial would be too traumatic for the child.[4] Nothing in the record indicates, however, that any determination of sort was ever made. At a minimum, there was no determination that C herself refused to testify. See especially *United States v. Hines*, 23 MJ 125, 133 (CMA

States having criminal jurisdiction may lawfully issue and *shall run to any part of the United States* . . ." Art. 46, Uniform Code of Military Justice, 10 USC § 846 (emphasis added). Article 47, UCMJ, 10 USC § 847, states:

> (a) Any person not subject to this chapter who –
>
> (1) has been duly subpoenaed to appear as a witness before a court-martial, ...
>
> (2) has been duly . . . tendered the fees . . . of a witness . . . ; and
>
> (3) willfully neglects or refuses to appear or refuses . . . to produce any evidence which that person may have been legally subpoenaed to produce;
>
> is guilty of an offense against the United States.
>
> (b) Any person who commits an offense named in subsection (a) shall be tried on information in a United States district court . . .

Although the court-martial had no final jurisdiction to punish Mrs. Ferdinand, *United States v. Praeger*, 149 F.474 (D.C. Tex 1907); *United States v. Rousseau*, 25 MJ 188 (CMA 1987) (Everett, C.J., concurring in the result), it strains credulity to suggest that an order issued by a state court supersedes a Federal subpoena, issued by the President of the United States, pursuant to a federal statute. US Const. art. VI. As the record fails to show that the military judge thought this to be the law, we need not address the power of a Federal subpoena issued in a court-martial. *Cf. United States v. Hinton*, 21 MJ 267 (CMA 1986).

[4] Graham, *supra* (n.1).

1986).[5] A military judge is hardly bound to accept a mother's unprofessional, lay opinion that requiring a child to testify at trial would so traumatize the child as to outweigh an accused' right to confrontation under the Sixth Amendment. Under these circumstances, it was error for the military judge to find that C was unavailable to testify at trial.[6]

Upon examination of the record, however, we are convinced that admission of C's statements was harmless beyond a reasonable doubt.[7] *Cf. Coy v. Iowa*, ____ U.S. ____, 108 S.Ct. 2798, 2803 (1988); *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed. 2d 705); *United States v. Remai*, 19 MJ 229 (CMA 1985).

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[5] There is no indication C refused to testify as a result of any control, coercion, or influenced by appellant. *Id.*

[6] Although C's statement substantially corroborates appellant's confession, *United States v. Arnold*, 25 MJ 129 (CMA 1987), *cert. denied*, 108 S.Ct. 1015 (1988); *United States v. Hines*, 23 MJ 125 (CMA 1986), we have reservations as to whether the reliability of the *ex parte* interview would pass constitutional muster. Deputy Sheriff Gabriel testified that it was her intent to use C's statements to corroborate appellant's confession. The transcript of the interview shows a number of leading questions about the incidents. Nothwithstanding Mrs. Ferdinand's opinion that C was a truthful person, there is nothing in the transcript of the interview to indicate that C understood the difference between telling the truth and telling a lie. Finally, Deputy Sheriff Gabriel interviewed C alone, with no opportunity for appellant to effect any type of cross-examination. *Cf. California v. Green*, 399 U.S. 149, 157, 90 S.Ct. 1930, 1934, 26 L.Ed.2d 489 (1970). These factors place the statement within the realm of the "investigative process" that we have heretofore found suspect *United States v. Barror*, 23 MJ 370, 372 (CMA 1987) (citing *Hines*). As this issue was not raised on appeal, we need not address it here.

[7] In addition to appellant's confession and admission to his wife about molesting his daughter, an Air Force Nurse gave corroborating physical evidence after having examined appellant's daughter.

The decision of the United States Air Force Court of Military Review is affirmed.

Chief Judge EVERETT and Judge SULLIVAN concur.

APPENDIX B

UNITED STATES AIR FORCE COURT OF MILITARY REVIEW

ACM 26373

UNITED STATES

v.

STAFF SERGEANT MICHAEL S. FERDINAND, FR 473-86-5677
UNITED STATES AIR FORCE

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21 April 1988

Sentenced adjudged 21 August 1987 by GCM convened at Offutt Air Force Base, Nebraska. Military Judge: Stephen R. Bloss (sitting alone).

Approved Sentence: Dishonorable discharge, confinement for four (4) years and reduction to airman basic.

Appellate Counsel for the Appellant: Colonel Leo L. Sergi and Captain Lynne H. Wetzell. Appellate Counsel for the United States: Colonel Joe R. Lamport, Lieutenant Colonel Robert E. Giovagnoni, Lieutenant Colonel Morris A. Tanner, Jr. and Major Carole W. Hanson

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Before

SESSOMS, LEWIS and BLOMMERS
Appellate Military Judges

DECISION

PER CURIAM:

We have examined the record of trial, the assignment of errors submitted on the appellant's behalf pursuant to

United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982), and the government's reply thereto and have concluded that the findings and sentence are correct in law and fact and that no error prejudicial to the substantial rights of the accused was committed. *See Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *United States v. Hines*, 23 M.J. 125 (C.M.A. 1986); *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986); *United States v. Cox*, 18 M.J. 72 (C.M.A. 1984). Accordingly, the findings of guilty and sentence are

AFFIRMED.

SEAL

OFFICIAL:

/s/ LAURA L. GREEN
Documents Examiner
Court of Military Review

☆ U.S. GOVERNMENT PRINTING OFFICE 1989—251 156/62081

Supreme Court, U.S.
FILED
DEC 14 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-763

In the Supreme Court of the United States

OCTOBER TERM, 1989

MICHAEL S. FERDINAND, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the erroneous admission of the out-of-court statement of petitioner's daughter was harmless error.

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OPINIONS BELOW

The opinion of the Court of Military Appeals (Pet. App. 1a-10a) is reported at 29 M.J. 164. The opinion of the Air Force Court of Military Review (Pet. App. 11a-12a) is unreported.

JURISDICTION

The judgment of the Court of Military Appeals was entered on September 27, 1989. The petition for a writ of certiorari was filed on November 14, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3) (Supp. V 1987).

STATEMENT

Petitioner, a member of the United States Air Force, was tried by a general court-martial at Offutt Air Force Base

in Nebraska. He was convicted of various types of indecent conduct in four separate specifications involving his six-year-old daughter, all in violation of Article 134 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 934, and Para. 87, *Manual for Courts-Martial, United States – 1984* (*Manual*) IV-129.[1] He was sentenced to four years' confinement, a dishonorable discharge, and a reduction in rank. The convening authority approved the findings and sentence. The Air Force Court of Military Review affirmed the findings and sentence. Upon discretionary review, the Court of Military Appeals affirmed.

1. Toward the end of March 1987, petitioner wrote a letter to his wife, Joann Ferdinand, in which he admitted that he had molested their six-year-old daughter for the past four years. Tr. 39-40, 42.[2] The next day Mrs. Ferdinand called the YWCA. Tr. 41. She was told that either she or petitioner would have to report the matter to the authorities, or that someone at the YWCA would do so. *Ibid.* Mrs. Ferdinand told petitioner, and on March 30 he called

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[1] Article 134 of the UCMJ is known as the General Article. It punishes three categories of crimes – termed Clause 1, Clause 2, and Clause 3 offenses – that are not expressly defined by other, more specific provisions of the Code. Clause 1 punishes "disorders and neglects to the prejudice of good order and discipline in the armed forces"; Clause 2 punishes "conduct of a nature to bring discredit upon the armed forces"; and Clause 3 punishes crimes in violation of federal laws applicable to civilians. Para. 60(c), *Manual* IV-109 to IV-110. Paragraphs 61-113 of the *Manual* flesh out the conduct that violates Clauses 1 and 2 by defining specific offenses under Article 134. See *Manual* IV-111 to IV-147. Paragraph 87, of which petitioner was convicted, makes it a crime to commit indecent acts or to take indecent liberties with a child. *Id.* IV-129. See also *id.* paras. 89c, 90c, *Manual* IV-131 (defining the term "indecent").

[2] Petitioner decided that a letter was the only way to break the news to his wife, instead of a face-to-face disclosure. Tr. 134.

John Zach of the Child Protective Services for the Department of Social Services in Sarpy County, Nebraska. Tr. 41, 55. After telling Zach that he had molested his daughter and that he wanted to turn himself in, petitioner was put in touch with Robin Gabriel, a deputy sheriff. Tr. 51, 55. Petitioner met with Gabriel the next morning, and he confessed to abusing his daughter, Tr. 55-62, 79-80, although he denied having had sexual intercourse with her, Tr. 59. Petitioner said that the acts occurred approximately once every four months, with the last one occurring about a month beforehand. Tr. 61, 73, 75.

The following day, April 1, Robin Gabriel interviewed petitioner's daughter. Tr. 42-43, 62, 67-71. The interview was recorded by audio cassette tape and reduced to a transcript. Tr. 63; PX 1. Petitioner's daughter corroborated petitioner's account of his misconduct. Tr. 67-71.

2. The government subpoenaed petitioner's daughter, but Mrs. Ferdinand refused to allow her daughter to testify at trial, for various reasons. Pet. App. 2a-4a; Tr. 30-38.[3] After finding that petitioner's daughter was unavailable to testify, Tr. 39, the trial judge admitted, over a defense

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[3] Mrs. Ferdinand disobeyed a subpoena directing her to bring her daughter to trial. Mrs. Ferdinand said that she would not allow her daughter to testify, even after the trial judge ordered her to do so, and that she fully understood the possible consequences of her recalcitrance. Tr. 32, 35, 36-38; PX 2. Mrs. Ferdinand refused to do so because she believed, based upon advice from two of her daughter's counselors, that bringing her daughter to court would be detrimental to her daughter's therapy. Tr. 32-33. Mrs. Ferdinand also was reluctant to produce her daughter because Mrs. Ferdinand had been advised that the state court guardian ad litem, who was assigned to her daughter once the charges against petitioner became known, would try to have her daughter placed in state custody if Mrs. Ferdinand disobeyed a state juvenile court order restraining her daughter from testifying in any court except the county juvenile court. Tr. 33-35. See Pet. App. 2a-4a, 7a-9a.

objection, Tr. 46-47, the transcript of her taped interview with Deputy Sheriff Gabriel pursuant to Mil. R. Evid. 804(b)(5), the so-called residual hearsay exception applicable to cases in which the declarant is unavailable. Tr. 67. In addition to the interview transcript, the government introduced the testimony of Deputy Sheriff Gabriel regarding petitioner's confession; Mrs. Ferdinand's testimony about petitioner's March 1987 letter; testimony by a Captain Veronica Kane, a pediatric nurse practitioner, about her clinical examination of petitioner's daughter;[4] and an inculpatory statement petitioner made to a Sergeant Joseph Pierce.[5]

3. On appeal, petitioner argued that the trial judge erred by admitting the transcript of his daughter's taped interview with Deputy Sheriff Gabriel. The Court of Military Appeals agreed, holding that the admission of the interview transcript violated petitioner's rights under the Confrontation Clause of the Sixth Amendment, because the government had not adequately shown that petitioner's daughter was unavailable to testify. Pet. App. 4a. Nonetheless, the court determined that the error did not require reversal. The court explained that "[u]pon examination of the record * * * we are convinced that admission of [the] statements was harmless beyond a reasonable doubt." *Id.* at 9a. The court specifically observed that "[i]n addition to [petitioner's] confession and admission to his wife about

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[4] Captain Kane performed a vaginal examination of petitioner's daughter, which revealed that petitioner's daughter did not have a hymen. Captain Kane, who performed an average of 20 such examinations per week on prepubescent girls, Tr. 85, 86, testified that that was "a very rare finding" in girls the age of petitioner's daughter, Tr. 90, 93, and that her finding was consistent with some of the misconduct charged against petitioner, Tr. 90-91.

[5] About six weeks before trial, petitioner told Sergeant Pierce that "I did those things." Tr. 83.

molesting his daughter, an Air Force Nurse gave corroborating physical evidence after having examined [petitioner's] daughter." *Id.* at 9a n.7.

ARGUMENT

Petitioner's sole claim is that the erroneous admission of his daughter's interview statements to Deputy Sheriff Gabriel was not harmless error.

The admission of evidence in violation of the Confrontation Clause can be harmless in a particular case. *Brown* v. *United States*, 411 U.S. 223 (1973); *Schneble* v. *Florida*, 405 U.S. 427 (1972); *Harrington* v. *California*, 395 U.S. 250 (1969). See *Coy* v. *Iowa*, 108 S. Ct. 2798, 2803 (1988); *Delaware* v. *Van Arsdall*, 475 U.S. 673, 681-684 (1986). The question an appellate court must answer is whether, based on the entire record, the government has shown beyond a reasonable doubt that the erroneously admitted evidence did not contribute to the verdict. *Delaware* v. *Van Arsdall*, 475 U.S. at 684; *Chapman* v. *California*, 386 U.S. 18, 24 (1967). The Court of Military Appeals correctly applied that standard in this case. Pet. App. 9a. The court found that, in light of the entire record – petitioner's confession to Deputy Sheriff Gabriel, petitioner's inculpatory letter to his wife, petitioner's inculpatory remark to his sergeant, and the results of Captain Kane's physical examination of petitioner's daughter – the erroneous admission of the interview transcript was harmless beyond a reasonable doubt. *Id.* at 9a & n.7. Because the Court of Military Appeals properly applied the *Chapman* harmless error standard to the facts of this case, that court's fact-bound determination that the error in this case was harmless does not warrant review by this Court. See *Francis* v. *Franklin*, 471 U.S. 307, 326 n.10 (1985) ("The primary task of this Court upon review of a harmless-error determination by the court of appeals

is to ensure that the court undertook a thorough inquiry and made clear the basis of its decision.").

Petitioner implicitly concedes that the error was harmless if his confession to Deputy Sheriff Gabriel can be considered, and he therefore challenges the Court of Military Appeals' reliance on his confession. Pointing to cases such as *Smith* v. *United States*, 348 U.S. 147 (1954), which reiterated the rule in the federal courts that a defendant may not be convicted on the basis of his uncorroborated confession alone, petitioner argues that without his daughter's statements to Gabriel, there was insufficient evidence to corroborate his confession, and that without such corroboration, his confession cannot be considered in determining whether the error was harmless.

Petitioner errs in claiming that his daughter's interview statements were the only corroboration for his confession. The other evidence noted above also performed that function.[6] The corroboration necessary to support a conviction based on a defendant's confession may take the form of independent proof that "bolster[s] the confession itself and thereby prove[s] the offense 'through' the statements of the accused." *Smith* v. *United States*, 348 U.S. at 156. That was true here, because independent evidence corroborated peti-

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[6] Petitioner also claims that the trial judge implicitly found that Captain Kane's testimony was not itself sufficient to corroborate petitioner's confession, because the trial judge dismissed one specification (Specification 5) at the close of the government's case-in-chief. Pet. 7-8 & n.3. That argument is immaterial, because Captain Kane's testimony was not the sole corroboration for petitioner's confession. Moreover, the specification to which petitioner refers was not dismissed for lack of corroboration. Defense counsel moved to dismiss that specification on the ground that the interview transcript did not show that petitioner's conduct occurred during the period alleged in the specification. Tr. 98. The government agreed, Tr. 99-100, and the trial judge dismissed the specification without comment. Tr. 100.

tioner's confession to the crimes. Petitioner's fact-bound arguments to the contrary do not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1989

☆ U.S. GOVERNMENT PRINTING OFFICE: 1989—262 203/00654